EXHIBIT 10
DATE 1/30/2013
HB 235

MEMORANDUM

TO: Montana House Judiciary Committee
FROM: J. Devlan Geddes and Spencer C. Thomas
Goetz, Gallik & Geddes, P.C.
Counsel for: Public Lands/Water Access Association Inc., Montana Wildlife Federation, and Montana Sportsmen's Alliance
DATE: January 28, 2013
RE: House Bill 235

HB 235, which aims to decriminalize "corner-crossings" on public land, does not constitute a taking under either Article II, section 29 of the Montana Constitution or the Fifth Amendment of the U.S. Constitution.

First, and foremost, the Legislature's decision not to prosecute a certain type of alleged trespass cannot constitute a taking as a matter of law. A taking actually requires that the government impose a burden or servitude upon private property. *U.S. v. Dickinson*, 331 U.S. 745, 748 (1947) ("Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."). HB 235 does no such thing. It merely declines to take criminal action against private citizens who elect to cross corners from public land to public land. It does not force property owners to act or omit from action in any particular way.

Assuming for the sake of argument that HB 235 is construed as a governmental intrusion onto private property, the U.S. Supreme Court has held that such an intrusion is not a taking when the state has a legitimate health, safety, welfare, or moral interest. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 125 (1978) (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)). The State of Montana, with its abundance of natural resources and recreational opportunities, certainly has a legitimate interest in providing public access to public lands.

Further, the "effect" of HB 235 is better classified as abating a nuisance to public land, rather than a taking of private land, because private landowners have no legal interest in controlling access to public lands they do not own. The legal interest at stake is access to public lands, the obstruction of which is illegal under the Unlawful Inclosures Act (UIA). 43 U.S.C. § 1063.

In *Camfield v. United States*, the Supreme Court held that the government could constitutionally compel the removal of fencing along private land under the UIA because the fencing was a nuisance with respect to public land access. 167 U.S. 518, 527 (1897). Due to the checkerboard pattern of alternating private and public sections of land, the fencing along the border of the private land obstructed access to sections of public lands. Congress was within its authority in preventing this interference with the use and enjoyment of public lands. *Id.*

The Tenth Circuit similarly addressed this question in *U.S. ex rel Bergen v. Lawrence*, 848 F.2d 1502 (10th Cir. 1988). It held that a 28-mile, non-wildlife friendly border fence along private land, which blocked antelope access to public lands, was an impermissible obstruction of access to public lands in violation of the UIA. More importantly, the court held that whether the required wildlife-friendly modifications to the fence amounted to a taking was "simply not at issue." The controlling issue was whether the fence unlawfully blocked access to federal lands, not whether it burdened private land. *Id.* at 1505.

Contrast these cases with the holding in *Leo Sheep Co. v. U.S.*, a case likely cited by opponents of HB 235. In *Leo Sheep*, the U.S. Supreme Court held that no implied public easement exists to build a roadway across any portion of private land for purposes of accessing public land. 440 U.S. 668, 678 (1979). The government actually constructed a road that crossed private land in order to access a public reservoir. Thus, a private property interest was

implicated, because the public access road traveled directly on a portion of private land and burdened that land without providing compensation.

HB 235, however, does not burden private land. It merely declines to prosecute a certain form of alleged trespass. Further, the property interest at stake is not the right to exclude; rather it is the ability to control access to land that property owners have no interest in.

Similarly, HB 235 does not create a nuisance on private property so as to constitute a taking under inverse condemnation law. While invading the airspace over private land may constitute a nuisance in certain circumstances, it only does so when it is of a sufficient magnitude to constitute "a direct and immediate interference with the enjoyment and use of land." *U.S. v. Causby*, 328 U.S. 256, 266 (1946); *see also Thornburg v. Port of Portland*, 233 OR 178 (Or. 1962) (interference by airport activities must be "sufficiently direct, sufficiently peculiar, and of sufficient magnitude" to support a takings claim.) (emphasis added). Stepping over an infinitesimal corner of private land does not amount to "direct and immediate" interference with the use and enjoyment of land.

Moreover, even under a regulatory takings framework, HB 235 is not a taking. The U.S. Supreme Court, in *Penn Central*, articulated the test for a partial regulatory taking. This test balances: 1) the economic impact of the regulation on the property owner; 2) the extent to which the regulation interferes with "investment-backed expectations;" and 3) the character of the government action. 438 U.S. 104, 124 (1978).

There is no taking under HB 235 because the bill, if passed into law, will not injure a recognized property interest, and thus cannot have an economic impact or interfere with expectations pertaining to private land. Specifically, the economic value derived from preventing corner-crossings is the private landowner's exclusive access to otherwise inaccessible

public land. However, the public already has a right to use public lands; Congressional policy under the UIA in fact forbids the obstruction of access to such public lands under the UIA. Thus, any economic impact or interference with investment-backed expectations for a private landowner stems from the disruption of his exclusive access to public lands. In other words, the only interest private landowners are seeking to protect by opposing HB 235 is the ability to block access to land they have no property interest in to begin with. As the U.S. Supreme Court has held, a taking does not occur when the "proscribed use *interests were not part of his title to begin with*." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added). In this case, HB 235 does not deprive private landowners of any legally recognized economic interest, and thus cannot amount to a regulatory taking.

For the reasons set forth herein, HB 235, if passed into law, will not constitute a taking and is constitutional under the Montana and Federal Constitutions.

End of Memo.